

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill

Submission to the Local Government and Environment
Select Committee

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Parliamentary Commissioner
for the **Environment**
Te Kaitiaki Taiao a Te Whare Pāremata

List of Recommendations

1. The purpose statement be changed to bring it in line with the Law of the Sea.
2. Consistency with the Convention on Biological Diversity be required.
3. Positive environmental effects of activities be taken into account, as well as adverse effects.
4. The term 'caution' be defined as the internationally accepted precautionary approach, and adaptive management be defined in line with RMA case law.
5. The single criterion in clause 61(2) that overrides all other considerations be removed.
6. The scope of the Benthic Protection Areas be extended and the Marine Reserves Bill be progressed.

Introduction

The ocean around New Zealand is divided into two legal regimes. The territorial sea lies within 12 nautical miles of the coast and environmental issues are managed under the Resource Management Act 1991 (RMA). But beyond this New Zealand has environmental responsibilities for the ocean within the Exclusive Economic Zone (EEZ) and the extended continental shelf (ECS). Together the EEZ and the ECS cover an area over twenty times larger than New Zealand itself. There is no legislative equivalent of the RMA for managing the impacts of developing resources in this vast area.

Advances in technology and changing economic viability have led to increasing interest in the resources on and beneath the ocean floor. Licences and permits granted in the last 10 years include¹:

- Two permits for mining petroleum
- 21 permits for exploring for petroleum
- A prospecting licence for phosphate on the Chatham Rise
- A prospecting licence for iron sands off Taranaki.

Such developments will present not only engineering challenges, but the potential for significant environmental impacts of a kind or on a scale new to New Zealand. For instance, the Texas-based oil company Anadarko is currently undertaking exploratory drilling at depths of 1400 and 1600 metres off the Taranaki coast. This is nearly fourteen times as deep as the water below the Maui platform, and about as deep as the sea where the huge oil leak occurred from a well in the Gulf of Mexico in 2010. It has recently been highlighted that New Zealand had only one government inspector for all of New Zealand's onshore and offshore oil and gas operations.²

The EEZ and ECS Bill is thus very important and very welcome.

The Bill's origin goes back 15 years to 1996. In that year, New Zealand signed the Convention on the Law of the Sea. This granted New Zealand sovereign rights to explore and exploit resources in the EEZ, subject to an obligation to protect and preserve the marine environment. In 2008, the

United Nations extended the rights (and obligation) to most of New Zealand's continental shelf beyond the EEZ.

Over the years since, work continued on developing policy and draft legislation, but progress was slow. In 2007, the OECD recommended that New Zealand "*finalise and implement the ocean policy and pursue the further expansion of marine reserves*".³

The proposed legislation establishes a skeleton for an administrative framework, but it is the regulations that will provide the muscle. The effectiveness of this legislation will thus depend on details that have yet to be established through regulations and standards set by the Minister for the Environment.

I have recommended a number of amendments to the Bill in this submission in five key areas.

- Purpose
- International obligations
- Matters to be taken into account
- Information principles
- Decisions

The ordering follows that in the Bill and should not be taken to represent the importance of the recommendations.

Recommendation 1 concerning the Purpose is particularly important since it sets the basis for all that follows, including the setting of regulations once the Bill has passed into law.

Recommendation 5 is also especially important, since clause 61(2) as currently written appears to be an error and a serious one.

The last section of the submission contains recommendations to the Committee concerning marine reserves.

1. Purpose

The purpose of the Bill is stated in clause 10 as achieving “a **balance** between the protection of the environment and economic development”.

This is not consistent with the Law of the Sea which states:

“States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”⁴

The right to exploit resources (and profit from royalties) in the EEZ and the ECS has thus been granted **conditional** on environmental protection.

Clause 11 in the Bill requires consistency with the Law of the Sea, so this conditional relationship is critical: we can pursue economic development, but we must protect the environment. The former - economic development - is optional. The latter – environmental protection - is not.

In the amendment to the purpose recommended below, the word “sustainable” has been used to link the management of the territorial sea under the RMA and the management of the EEZ and the ECS.⁵ It simply does not make sense for the management of ocean resources to stop being sustainable 12 nautical miles from the coast as one legal regime transitions into another.

A separate point is that subclause 10(1)(b) requires decision-makers to apply only one of the four information principles in clause 13. This seems to be a technical error since the information principles are intended to be taken together. A simple amendment to deal with this is recommended below.

I recommend that:

1. Clause 10 (1) is amended as follows:

The purpose of this Act is to provide for sustainable economic development while ensuring the protection of the environment in the exclusive economic zone and on the extended continental shelf by –

a) [...]

b) requiring them to apply the information principles in section 13; and

c) [...]

2. International obligations

Clause 11 appropriately requires consistency with the UN Convention on the Law of the Sea. However, New Zealand has signed a number of other international environmental conventions relevant to ocean management, including agreements on hazardous substances, oil and waste pollution and conservation.

The UN Convention on Biological Diversity (Biodiversity Convention) stands out as particularly relevant to the Bill. This Biodiversity Convention commits New Zealand to *“integrate consideration of the conservation and sustainable use of biological resources into national decision-making”*.⁶

Commitments from the Biodiversity Convention are reflected in the New Zealand’s Fisheries Act 1996, Conservation Act 1987 and Resource Management Act 1991. Australia’s legislation for protecting the environment of its EEZ and ECS explicitly invokes the Biodiversity Convention many times.⁷

The Biodiversity Convention can be incorporated in clause 11 either by specifically referring to it, or more broadly by requiring consistency with all relevant international environmental conventions. Since both methods have merit, alternative amendments are offered to the Committee.

I recommend that:

2. Clause 11 is amended to either:

This Act must be interpreted, and all persons performing functions and duties or exercising powers under it must act, consistently with New Zealand’s international obligations under the Convention on the Law of the Sea and under the Convention on Biological Diversity

or, more broadly:

This Act must be interpreted, and all persons performing functions and duties or exercising powers under it must act, consistently with New Zealand’s international environmental obligations

3. Matters to be taken into account

Clause 12 lists eight matters to be taken into account in making decisions on applications for marine consents. The first of these is *“the adverse effects on the environment of all activities [...]”*.

This restriction to consideration of **adverse** effects is unnecessary, and it is possible that some marine activities may have **positive** environmental effects. Examples of such potential activities are wave energy convertors and undersea turbines because they would be sources of low carbon renewable energy.⁸

The RMA requires consideration of positive as well as adverse effects⁹, and requires decision-makers to have particular regard to the benefits from renewable energy.¹⁰

I recommend that:

3. Clause 12(a) be amended as follows:

the effects on the environment of all activities undertaken in the area of the exclusive economic zone or the continental shelf, including the effects not regulated under this Act.

4. Information principles

Clause 13 establishes a set of principles for considering information, or the lack of it, when making decisions. The second and third of these deal with the cautious approach be taken when information is “*uncertain or inadequate*”.

Uncertain and inadequate information on the effects of marine activities is likely to be the norm rather than the exception, so how these principles are expressed is extremely important.

The second information principle - favouring caution and environmental protection

Clause 13(2) states that “*If ... the information available is uncertain or inadequate, the person must favour caution and environmental protection.*”

What does it mean to “*favour caution*”? The Bill does not define it. However, a widely recognised definition of the “precautionary approach” exists.

In 1992, the Rio Declaration on Environment and Development (supported by New Zealand along with 107 other countries) stated that:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹¹

The term “precautionary approach” does not mean “do nothing until perfect information is available”, as some advocates and detractors have incorrectly characterised it.¹² It is about being prudent rather than negligent or reckless with the environment. While this will sometimes restrict activities, it is usually about allowing activities to proceed and using conditions to minimise risks.

There are several reasons why using the term “precautionary approach” in the Bill would be preferable to the vague “favour caution”.

- It has an internationally recognised long-standing definition in the Rio Declaration.
- The Rio definition is consistent with the Government's intent expressed in the recent Cabinet paper: *"Where there is a reasonable chance of adverse effects but scientific uncertainty or insufficiency of information, any burden of proof that adverse effects are acceptable should rest with the applicant. The lack of certainty shall not prevent measures being taken to avoid, remedy, or mitigate potential adverse effects"*.¹³
- The precautionary approach has been explicitly invoked in regulations made under the Law of the Sea.¹⁴
- The Hazardous Substances and New Organisms Act 1996, which is now administered by the Environment Protection Authority, uses the phrase "the need for caution" in a section headed "Precautionary approach"¹⁵, thereby explicitly linking "caution" and the precautionary approach.

Finally, the phrase *"favour caution and environmental protection"* leaves open the possibility of applying caution to something other than environmental protection.

I recommend that:

4A. Clause 13(2) is amended as follows:

"...the person must apply a precautionary approach to environmental protection"

or

the following definition is added to clause 4

"caution means the precautionary approach, as defined by the 1992 Rio Declaration on Environment and Development".

The third information principle - adaptive management

Clause 13(3) states that if an activity is likely to be prohibited or a marine consent refused, *“the person must first consider whether taking an adaptive management approach would allow the activity to be undertaken.”* Adaptive management has a great deal of merit, but it requires a tighter definition in clause 4 of the Bill.

Adaptive management is a ‘learn as you go’ way of applying the precautionary approach. As the effects become clearer, management techniques are adapted to protect the environment. It may be that the effects are sufficiently serious for the consent to be revoked.

Some may argue that a precautionary approach and adaptive management are at odds with each other. They may believe that one is good and the other bad; that only one is appropriate. However, the two can work together and are largely interdependent.

Adaptive management:

- encourages caution and prudence because the activity will only be allowed to continue if its effects are addressed as they become apparent;
- is focused on environmental effects so the applicant can decide how best to manage these effects; and
- stimulates technological innovation, which is particularly important because our knowledge of the marine environment, and of the potential effects of activities, is so limited.

However, adaptive management is not always appropriate. It is stated in the 2011 Cabinet paper that adaptive management “does not negate the need to exercise caution in situations where there is a threat of serious or irreversible environmental damage occurring”.¹⁶

The Environment Court has accepted the use of adaptive management under the Resource Management Act 1991, despite it not being mentioned in the Act. Some examples include marine farms, a run-of-river hydro scheme and a tidal energy project.¹⁷

The Court has restricted the use of adaptive management to where effects are not likely to be serious and are able to be reversed over time.¹⁸ The need for strict threshold levels to trigger responses to monitoring results has also been established through case law.¹⁹

In effect, the Environment Court has defined adaptive management and this definition should be used in clause 4(1) of the Bill. Moreover, the third part of the definition 4(1)(c) as it currently stands should be deleted because it makes no sense to define adaptive management approach as “any other approach”. A phrase to clarify when the use of the adaptive management approach is not appropriate should also be added to the definition.

I recommend that:

4B. Clause 4 (1) is amended as follows:

adaptive management approach means –

a) allowing an activity to be undertaken on the basis that consent can be revoked if the effects are more than minor; and

b) allowing an activity to commence on a small scale or for a short period so that its effects can be monitored;

but does not include allowing an activity to commence if its effects are likely to be serious or irreversible.

5 Decisions

Clause 61 sets out the process that the Environmental Protection Authority (EPA) must follow in making decisions on marine consents. Subclause 2 contains a final and separate test.

A marine consent can be granted for an activity if *“the activity’s contribution to New Zealand’s economic development outweighs the activity’s adverse effects on the environment”*. If the reverse holds, then the consent may be declined.

This test undermines clauses 10 through 13: ‘Purpose’, ‘International obligations’, ‘Matters to take into account’, and ‘Information principles’, because it sets out a single overriding criterion for making decisions. The EPA may set aside all other considerations and simply make decisions on this single criterion. This is a serious error.

Moreover, this test in practice would be heavily weighted towards granting marine consents because economic benefits can be quantified much more readily than environmental benefits.

Decision-making criteria are already established in clauses 10 through 13, so clause 61(2) should just be a simple statement of process.

I recommend that:

5. Clause 61(2) is amended as follows:

After complying with subsection (1) and sections 59 and 60, and subject to Part 1 Subpart 2, the EPA may grant or refuse an application for marine consent, in whole or in part.

6 Marine reserves

This Bill is set up to manage environmental effects in the ocean similarly to the way the RMA manages environmental effects within New Zealand. But the Law of the Sea requires something more than this: signatory states must “*protect and preserve*” the marine environment in the EEZ and the ECS.

Several statutes enable the establishment and maintenance of protected areas on land and in the territorial sea.²⁰ About 30% of New Zealand’s land area is set aside as public conservation land and about 10% of the territorial sea is set aside as marine reserves. In contrast, there is no legislation in place that can create (and protect and preserve) marine reserves within the EEZ and ECS.

Over 30% of the sea floor in the EEZ is already protected from bottom trawling and dredging in regulations established under the Fisheries Act 1996.²¹ Other activities regulated by the EPA that would damage the sea floor in these Benthic Protected Areas could be prohibited through regulations associated with the Bill once it becomes law.

However, the Marine Reserves Bill, currently before the Local Government and Environment Committee, will address area protection more comprehensively. It will:

- allow the formation of marine reserves in the EEZ and ECS,
- provide for different levels of protection, and
- widen the purpose of reserves to include ecosystem preservation.

It is over nine years since the First Reading of the Marine Reserves Bill.²² Given the growing pressure to exploit marine resources, this legislation should be urgently advanced.

I recommend that:

6. the Local Government and Environment Committee

- **asks the Minister for the Environment to consider extending the prohibition on bottom trawling and dredging activities in the Benthic Protection Areas to all activities that would impact on the sea floor, and**
- **progresses the Marine Reserves Bill (2002) as soon as possible.**

Notes and References

- 1 Ministry of Economic Development, New Zealand Petroleum & Minerals Register (on-line services): http://www.nzpam.govt.nz/cms/banner_template/, accessed: 13.12.2011.
- 2 In response the establishment of a High Hazard Unit has been announced: <http://beehive.govt.nz/release/high-hazards-unit-be-established>, accessed 12.12.2011
- 3 OECD Environmental Performance Reviews: New Zealand (2007), Chapter 1: Conclusions and Recommendations, 3. International Co-operation, p. 10.
- 4 United Nations Convention on the Law of the Sea (UNCLOS) 1992. part XII. Section 1. Article 193. this follows article 192, which states: "*States have the obligation to protect and preserve the marine environment*".
- 5 The purpose of the Resource Management Act 1991 is also expressed as a conditional relationship between resource use and environmental protection.
- 6 United Nations Convention on Biological Diversity. 1992. Article 10 (a).
- 7 Environmental Protection and Biodiversity Conservation Act 1999 (Cth)
- 8 The New Zealand Energy Strategy (2011) contains a policy of "Fostering the deployment of new renewable sources such as marine energy."
- 9 Resource Management Act 1991, ss 3(a), 104(1)(a)
- 10 Resource Management Act 1991, s 7(j)
- 11 United Nations. 1992. The Rio Declaration on Environment and Development, Principle 15. The United Nations Conference on Environment and Development, Rio de Janeiro, 1992.
- 12 One recent example is a column in the Dominion Post, where the application of the precautionary principle is described as "*no invention or innovation can be exploited until zero-risk has been proved*". World of Science, Dominion Post, 12 December 2011.
- 13 Proposal for Exclusive Economic Zone Effects Legislation, Cabinet paper, 2011. Paragraph 58. <http://www.mfe.govt.nz/cabinet-papers/cab-paper-eez-environmental-effects-legislation.pdf>, accessed 30 November 2011.

- 14 Regulations for Prospecting and Exploration of Polymetallic Nodules, Regulations for Prospecting and Exploration of Polymetallic Sulphides. A recent advisory opinion of an International Tribunal unanimously found the precautionary approach to be implicit in the Law of the Sea. "The provisions of the aforementioned Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation." The International Tribunal Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 2011. Responsibilities and obligations of states sponsoring persons: Advisory Opinion. Paragraph 127.
- 15 Hazardous Substances and New Organisms Act 1996, s 7
- 16 Proposal for Exclusive Economic Zone Effects Legislation. Cabinet paper, 2011. Paragraph 59. <http://www.mfe.govt.nz/cabinet-papers/cab-paper-eez-environmental-effects-legislation.pdf>, accessed 30 November 2011.
- 17 See Golden Bay Marine Farmers v Tasman District Council ENC Wellington W19/2003, Clifford Bay Marine Farms Ltd v Marlborough District Council ENC Christchurch C131/2003, Groome v West Coast RC [2010] NZEnvC 399, and Crest Energy Kaipara Ltd v Northland Regional Council NZEnvC 26, 2011. In the latter case, the Environment Court approved a staged development programme, with the first stage allowing for three turbines to be installed and a period of monitoring before adding further turbines.
- 18 Clifford Bay Marine Farms Ltd v Marlborough District Council ENC Christchurch C131/2003 at [147] and [157].
- 19 Groome v West Coast RC [2010] NZEnvC 399 at [15]: *"A true adaptive management response would set triggers and prompt a response selected from a number of possible contingency actions [...]. All of the data from the monitoring programmes would be evaluated and used to inform a consideration of the most appropriate management response. Ongoing monitoring would determine whether or not the management action taken was effective in remedying and/or mitigating the effects and achieving the overall objectives set [...]."*
- 20 Including the Reserves Act 1977, Marine Reserves Act 1971, and Conservation Act 1987.
- 21 The Fisheries (Benthic Protection Areas) Regulations 2007 followed the initial closure of certain sea mounts for bottom trawling and dredging in 2001.
- 22 Marine Reserves Bill 2002 (224-1)